January 30, 2006

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: ***Petition for Rulemaking of Fibertech Networks (Docket No. RM-11303)***
Comments of segTEL, Inc.

Dear Ms. Dortch:

Attached for electronic filing are the Comments of segTEL, Inc. in support of the Petition for Rulemaking of Fibertech Networks in the above referenced docket.

Sincerely,
/s/ Jeremy L. Katz

Jeremy L. Katz
Chief Executive Officer

PETITION FOR RULEMAKING OF FIBERTECH NETWORKS
(Docket No. RM-11303)

Comments of segTEL, Inc.

TABLE OF CONTENTS

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Comments of segTEL, Inc.

SUMMARY

segTEL, Inc. ("segTEL") hereby submits comments in support of the petition of Fibertech Networks, LLC ("Fibertech"), requesting that the Commission adopt "best practices" that address the need for improved competitor access to poles and conduits. segTEL's comments describe its difficulties in attempting to obtain access to utility poles and conduits in its northern New England service area. Many of segTEL's experiences correspond closely with the experiences described by Fibertech.

segTEL endorses Fibertech's proposals that pole owners permit the use of boxing and extension arms in appropriate circumstances, and urges the Commission to accept Fibertech's proposals to shorten the time frames allowed for utilities to complete surveys and make-read work. segTEL also supports Fibertech's proposals that competitors be allowed to search utility records and survey manholes to determine availability of conduit and hire utility-approved contractors to perform field surveys and make-ready work. In addition, Fibertech's proposal for pre-approval of drop lines is reasonable and should be incorporated into the Commission's rules.

Fibertech's proposal that building entry conduit be made available to competitors is strongly endorsed by segTEL, along with a request that the Commission address the competitive problem of conduit being unavailable for building entry at ILEC central offices. In addition, segTEL recommends that the Commission expand the scope of the best practices suggested by Fibertech, to include a rule that pole owners and other attaching parties be held responsible for correcting their own past practices that have caused wasted space on poles, rather than allowing these costs to fall on new attachers.

PETITION FOR RULEMAKING OF FIBERTECH NETWORKS

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Comments of segTEL, Inc.

I. Introduction

On behalf of segTEL, Inc. ("segTEL") I am pleased to submit the following comments in support of the petition of Fibertech Networks, LLC ("Fibertech"), requesting that the Commission adopt "best practices" that address the need for improved competitor access to poles and conduits. segTEL is a facilities-based provider of advanced, integrated packages of communications services to customers in sparsely and moderately-populated areas of northern New England. Within our company's service area there are eight electric utilities, one regional ILEC and eight independent ILECs. segTEL has entered into pole attachment agreements with several of these companies.

segTEL serves two states (Vermont and Maine) that have certified that they regulate pole attachments and a third (New Hampshire) that has not.[1] Accordingly, in New Hampshire, segTEL has nowhere to look but to the FCC for assistance in resolving pole attachment problems. With respect to the pole attachment policies of many electric utilities and incumbent local exchange carriers ("ILECs"), Fibertech effectively describes an oppressive environment that is overly-burdensome to competition, and recommends a number of "best practices" that will help to relieve the problem. segTEL hopes that by describing its own experiences it will aid the Commission in deciding to act favorably on Fibertech's request to open a rulemaking

[1] Public Notice, "States That Have Certified That They Regulate Pole Attachments," 7 FCC Rcd. 1498 (rel. Feb. 21, 1992).

proceeding. As noted by Fibertech, its proposals have already been implemented by a significant number of utilities, and some have been endorsed by the Commission in prior rules and adjudications. However, the Commission's decisions are spread throughout hundreds of pages of decisions where they may be difficult to find and may be contained in the records of case-specific adjudications. While the records of adjudications provide valuable "regulatory common law," they are not as effective as are rules of the Commission in affecting the future conduct of pole and conduit owners.

The Commission has correctly said in the past that pole attachments are crucial to the development of competition.[2] segTEL strongly agrees, and believes that the ability of telecommunications providers to efficiently utilize existing utility poles and conduit is an essential factor in the successful development of tomorrow's communication networks. segTEL endorses the following recommendations of Fibertech and adds several recommendations of its own, as set forth below.

II. Discussion

The Commission should require pole owners to permit use of boxing and extension arms in appropriate circumstances.

segTEL agrees with Fibertech that boxing of poles and use of extension arms can be a reasonable means of adding capacity to utility poles. Fibertech has proposed reasonable criteria for deciding when boxing of poles and use of extension arms should be permitted, and segTEL agrees that boxing of poles and use of extension arms are appropriate when they would render unnecessary a pole replacement or rearrangement of other carriers' facilities. segTEL also

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[2] *See, e.g., In re Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments,* CS Docket No. 97-151, Report & Order, 13 FCC Rcd 6777, FCC 98-20, at ¶ 2 (rel. Feb. 6, 1998).

agrees that such techniques are appropriate when facilities on the pole are accessible by ladder or bucket trucks. However, segTEL does not agree that boxing of poles and use of extension arms should be contingent on the pole owner having previously allowed such techniques.[3] It is an accepted practice in the telecommunications industry to use of "pole boxing," as well as extension arms and standoff assemblies for the placement of additional cable with required clearances.[4] A pole owner should not be permitted to deny the use of extension arms for the mere reason that it has not formally allowed the practice in the past.

Pole owners and other attaching parties should be responsible for correcting their own past practices that have caused wasted space on poles.

Fibertech's recommendation that boxing of poles and use extension arms be allowed in most cases arises from the fact that many poles are near capacity. Another aspect of that same problem is the frequent reality that previous attachers have wasted space on poles, resulting in new attaching parties having to pay for otherwise unnecessary make-ready work.

One problem segTEL encounters frequently is that the ILEC has taken the lowest position on the poles, but has placed its lowest cable substantially higher than the minimum clearance. For example, in New Hampshire the minimum clearance is generally 16 feet (18 feet at road crossings), but there are many cases in which the ILEC is the only attacher in the communications space of the pole but has placed its facilities at a location that leaves substantial space for attachment between the minimum clearance location and the ILEC's actual attachment.

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[3] segTEL is unable to determine precisely the circumstances under which pole owners have previously allowed boxing of poles and use of extension arms, but believes that the utilities and their contractors have often engaged in these practices themselves, without documentation. In any event, segTEL staff have personally observed boxed poles and use of extension arms on poles belonging to utilities that purport to prohibit these practices.

[4] BLUE BOOK – MANUAL OF CONSTRUCTION PROCEDURES § 3.3 (Bellcore Communications Research, Inc., Special Report SR-1421, Issue 3, December 1998) (hereinafter, the "Bellcore Blue Book") (stating that use of standoff assemblies are an "optimal method of providing required clearance").

However, when a competitor applies to the ILEC for an attachment license, the ILEC requires the new attacher to pay make-ready costs to lower the ILEC's attachment. Often, that ILEC lowers its attachment only enough to accommodate the new entrant, so that the next applicant must go through the same process of paying make-ready costs to move the ILEC's facilities a second time.

ILECs and other pole owners are not the only attaching parties who may have wasted pole space by making improper attachments of their facilities. In segTEL's experience, cable television companies, municipalities and other CLECs are often found to have attached their facilities in a manner or location that impairs future access to the communication space on poles. Under most pole attachment agreements and pole owner policies, the newest applicant for attachment must pay all parties' make-ready costs to accommodate its new facility, even if it means paying to correct a previous attacher's improper use of pole space.

To resolve these problems, segTEL recommends the following: (a) if the ILEC is claiming the right to be the bottom attacher on any joint use pole, then FCC rules should require the ILEC to attach its facilities at the pole's minimum clearance level and move pre-existing attachments to that position; or (b) if the ILEC does not wish to move existing facilities to the minimum clearance level at its own expense, it should permit new attaching parties to cross over its facilities in a reasonably acceptable fashion and attach in a lower position. In no event should a new attacher be required to pay make-ready costs for a previous attaching party (including the pole owner) when the costs are necessitated by that previous attaching party's facilities having been attached in a manner that is inefficient and wastes pole space. Any make-ready work undertaken should be engineered to increase attachment space on the poles to the greatest extent possible, so as to minimize the need for future make-ready work.

In the case of municipal attachers, segTEL has often found pole owners unwilling to impose any sort of requirement that inefficient or improper attachments be corrected. Practices that would be considered "unauthorized" by a competitor are tolerated without objection when committed by a municipality for fire alarm, traffic signal or street lighting purposes. Leaving aside the safety issues that might be implicated in such cases, the practice imposes additional make-ready costs on future attaching parties who must work around the improperly located municipal facilities.

The Commission should establish shorter survey and make-ready time periods, and should express its intention to assess monetary sanctions against pole and conduit owners who materially and unreasonable fail to meet the time limits.

segTEL would be able to list numerous occasions in which a utility has taken much longer than necessary to conduct a survey for availability of pole and conduit space and to perform make-ready work. segTEL notes that similarly situated adjoining utilities can have vastly different response times in approving pole attachments, causing a reasonable impression that the delays imposed by some pole owners are either intentional or caused by indifference to the FCC's regulations. For example, segTEL notes that Public Service Company of New Hampshire has maintained an excellent record of average end-to-end service completion (from application to issuance of a license) of under 60 days, <u>including make-ready work</u>. A neighboring utility, dealing with nearly identical applications for as few as 40 pole attachments at a time, tolerates a backlog of applications that have been pending for more than 500 days, even after segTEL has paid in full for make-ready work.

In its petition, Fibertech describes the conduit survey and approval process in great detail, including the procedure for "rodding, roping and slugging."[5] If the rod, rope and slug process is successful in verifying unobstructed conduit in serviceable condition, then it is followed by installation of innerduct. In the experience of segTEL, conduit owners ordinarily do not have the innerduct installation process staged to commence when rodding, roping and slugging is completed, which results in "down time" between the stages of make-ready, adding 2-4 additional weeks of waiting to the licensing process and doubling labor, staging and travel costs associated with an inefficiently separated state of site work. segTEL believes that the Commission should require pole and conduit owners to use efficient scheduling and coordination of the various phases of make-ready work, so as minimize waiting time and expense for the attaching party.

With respect to the utility with which segTEL has had the most difficulty, there has not been one occasion in which its survey work been completed within 45 days from the date segTEL submitted its application.[6] Of 12 applications submitted by segTEL to this one utility in 2004, involving 970 poles in total, the utility's combined time frame for review of office records, conducting a field survey and preparing make-ready price quotes has averaged more than 150 days.[7] It should be emphasized that after being subject to this outrageous waiting period, segTEL must pay for make-ready work in advance and continue to wait for the actual make-ready work to be completed. Several applications have been pending for a total of more than 500

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[5] Fibertech Petition at 9.

[6] Commission rules require access to a utility's poles, ducts or conduits be granted or denied within 45 days of application. 47 C.F.R. § 1.1403(b).

[7] According to segTEL's records, the time periods calculated are inclusive of an average of approximately 5 days in which the utility was required to wait for responses from segTEL. Records documenting these time lines are available upon request of the Commission.

days, even though segTEL paid for the make-ready work as soon as the estimate of make-ready charges was provided.

An additional aspect of this outrageous conduct by one utility is that this company's poles are interspersed with another utility's structures, and the other utility issued pole licenses to segTEL many months earlier. Therefore, to avoid forfeiting its licenses from the other utility, segTEL has had to begin paying license fees to that other utility, but it cannot actually attach its cabling to any poles until its licenses are granted by both joint custodians of the poles. Accordingly, segTEL is incurring direct monetary losses in addition to the lost revenue opportunities from not being able to extend its network. The Commission should make clear in its rules that direct damages will be recoverable against a utility that violates the survey and make-ready time guidelines.

The Commission should allow competitors to hire utility-approved contractors to perform field surveys and make-ready work.

segTEL strongly agrees with Fibertech that pole owners should be required to engage in some form of pre-approval of contractors for make-ready surveys and make-ready work. At least two options should be available to pole owners: (a) the utility should maintain its own list of contractors that an attaching party may hire for surveying and make-ready work, which list should always include at least three available contractors; or (b) pole owners should cooperate on a regional basis in the development of an accreditation program for pole contractors. Either action should promote the interests of attaching parties to have as wide a choice of contractors as possible, so as to promote competition and thereby contain the cost of pole surveys and make-ready work.

The Commission should require pole owners to allow installation of drop lines to satisfy customer service orders without prior licensing.

As pointed out by Fibertech in its petition, the issue of drop lines was addressed by the Cable Service Bureau in its 2000 decision in the *Mile High Cable* case, in which it concluded that "drop poles are subject to notification requirements but not prior approval requirements separate from the approval of the attachment for which it is an adjunct."[8] segTEL agrees with Fibertech that a reasonable and enforceable drop line policy will enhance competition among facility-based providers.

Time frames for installation of drop lines are important for competitive reasons. In general, drop lines are closely associated with activating new subscribers' service. Drop lines are not ordinarily installed as part of a carrier's primary route construction, but are more commonly installed to a particular building only after the first subscriber orders service. Competitive carriers focus their construction dollars on buildings where a customer order has been received. Therefore, once the customer has ordered service from a competitor, the installation interval becomes an urgent matter. Therefore, the ordinary time frames for licensing of pole attachments in large primary construction projects are unreasonably long when considering attachments to a drop line. If, for example, a new entrant can be delayed in attaching to a drop line pole for 45 days (or the much longer periods of time to which segTEL has routinely been subjected), the competitor will probably have lost the customer to a competitor long before the attachment is approved. In addition, an advance application to an ILEC for attachments to a drop poles can have competitive repercussions, because it reveals that the CLEC

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[8] *Mile Hi Cable Partners v. Public Service Co.*, PA 98-003, Order, 15 FCC Rcd. 11450 ¶ 20 (Cable Serv. Bur. 2000)

expects to sell competitive service to a customer in a specific building, perhaps triggering a "win back" response from the incumbent.

The Commission should require pole and conduit owners to allow competitors to search utility records and survey manholes to determine availability of conduit, and limit charges if the utility performs these functions.

Many pole and conduit owners require that requests for access to their poles be accompanied or followed shortly thereafter by an access application form and a processing fee. In the case of one utility to which segTEL must apply for attachments, the fee for an office records review and field survey is $45 per pole, compared with a similarly situated utility in the adjacent service area that charges nearly 70% less. The purpose of reviewing office records is to make a preliminary determination of whether or not structures are available in the areas requested by the attaching party. The field survey is intended to document pole and conduit locations, make a final determination that structures are available for occupancy, assess loading and guying requirements, document the adequacy of clearances and provide make-ready notes. Most pole owners also use this survey process to estimate the cost of make-ready work, for which segTEL is generally (and improperly) required to pay before make-ready work begins.

The processes described in the preceding paragraph have produced many of the disagreements between pole owners and attaching parties. Typical problems include violations of acceptable time frames, whereby the utility fails to complete these tasks within the 45 days allowed by the Commission's rules. The second common problem, as experienced by segTEL, is that the fees charged by pole owners for these services exceed reasonable amounts. The problem of fees may include exorbitant minimum charges for very limited surveys, which segTEL has known to exceed $1000 for conduit searches in some cases. The problem may also include fees structured on a per-pole basis, such as the $45 example cited in the preceding

paragraph. Or, prices may be simply too high because of inefficiency by the pole owner or (perhaps) price gouging.

Without the benefit of a cost study, the pole owner's actual costs cannot be determined by the applicant, but it is still intuitive that the $45 per pole fee being charged to segTEL by one utility exceeds a just and reasonable standard, especially in light of dramatically lower fees charged by similar utilities in similar situations. That conclusion is supported by the fact that there is no discount allowed for large attachment applications. While the start-and-stop costs of office record searches and travel time to the pole locations for a field survey may be a material component of the cost that a utility is entitled to recover, a fixed fee does not reflect the reality that start-and-stop costs and travel time likely are not higher for one hundred pole attachments than for one.

Another conduit owner in segTEL's service territory purports to charge only its actual costs (plus a 10% "administrative fee") to survey manholes, but requires unreasonably high advance pre-payments against the future assessment of those costs. Whether or not the prepayments are intentionally inflated, they have a harmful and inhibitive effect on market entry by competitors. The problems arising from of inflated pre-payments for manhole searches and fixed fees for surveys, as discussed in the preceding paragraph, are one and the same--they provide a barrier to competitive entry and they both have been addressed by the Commission in past proceedings. In an order of the Commission released on October 26, 1999, the Commission addressed survey fees by stating that "a utility may require an inquiring entity to reimburse the

utility on an actual cost basis . . .."[9] In at least one subsequent proceeding that the Commission declared "analogous," the Commission concluded that "[the utility] should first incur the costs of make-ready, and then seek reimbursement for its actual make-ready costs."[10] These decisions clearly express the Commission's intent that survey costs and make-ready work are not to be subject to fixed fees or prepayments, even if excess amounts are refunded to attachment applicants after the fact.

segTEL acknowledges that pole owners have an interest in not incurring costs in reliance on promises of payment by non-creditworthy applicants. However, the time-honored method by which utilities protect against such risks is to require reasonable security deposits when justified by a lack of sufficient credit history, in which case interest is payable when the deposit is refunded.

In addition to the clearly-prohibited practice of requiring fixed survey fees and prepayments, there is still a problem of pole owners charging more than a reasonable amount for these services. For example, in one recent case, a conduit owner charged segTEL a total of twelve hours of travel time for three employees to visit a single site on which 47 feet of duct was located, on the basis that a contingent of three employees is used for conduit work, even when the facility is very small. Competitive carriers cannot afford that sort of overstaffing.

It is the opinion of segTEL that one of the surest methods of avoiding excessive survey fees (and service delays) is to allow attachers to review records and conduct surveys by use of their own independent contractors. Some pole and conduit owners already have established the

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[9] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Order on Reconsideration, 14 FCC Rcd. 18049 (rel. Oct. 26, 1999) at ¶ 107 (emphasis added).

[10] *Cable Television Association v. Georgia Power Co.*, PA 01-002, Order, 18 FCC Rcd. 16333 (Enforcement Bur. 2003) at ¶20.

practice of allowing contractors to review office records on the company's premises, using the same records that the utility's employees would use to conduct the same office research. segTEL supports that practice. However, there are significant differences in how much those companies charge for their costs in administering this process, and some charges seem to be set so high as to be intentional deterrents to use of contractors by attaching parties. Obviously, pole owners are entitled to recover their costs of having contractors work on their premises to conduct office records review, and of having utility employees review survey work for accuracy. However, the charges need to be reasonable. segTEL believes the Commission should enact the rule advocated by Fibertech.

The Commission should require utilities to use conduit efficiently and allow spare conduit to be reserved only as absolutely necessary to accommodate the ILEC's own bona fide development plans and to facilitate maintenance.

In segTEL's experience, the reservation by owners of spare conduit for purposes of maintenance and future use is rife with abuse. Under the law, one of the bases on which a utility may deny access to its poles and conduit in circumstances where insufficient capacity exists.[11] However, there is often reasonable dispute as to whether additional capacity is available, or whether it already has been committed to another valid purposes. Under the Commission's rules, a conduit owner may reserve facilities for future use only "as consistent with their bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service."[12] segTEL has found that ILEC conduit owners have reserved more conduit than is reasonably required for their own bona fide plans. In more than one case, access

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[11] 47 U.S.C. § 224(f)(2).

[12] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996) at ¶ 1168.

to available innerduct and conduit was needed by segTEL but was denied on the basis that the conduit previously had been reserved for the ILEC's "maintenance" purposes. The Commission should take comments from technical experts on how much spare conduit is needed for customary maintenance purposes, and limit the reserve conduit to that amount. An ILEC has even denied segTEL access to a 4-inch conduit on the basis that the ILEC's own facilities in an adjoining 4-inch conduit might someday need to be moved, without any showing that reservation of conduit on a one-for-one basis was justified by the ILEC's bona fide development plans or maintenance purposes. In other cases, the same ILEC has precluded the placement of innerduct into a 4-inch conduit on the basis of a single unprotected ILEC cable being inefficiently placed (without innerduct) within the larger duct system. Practices such as this should be prohibited by the Commission.

The Commission should require utilities to share building-entry conduit with competitive LECs and cable providers.

Building entry conduit is a crucial asset. In the experience of segTEL, Fibertech makes an accurate statement when it says that "landlords are extremely reluctant to permit the drilling of additional holes in building foundations to accommodate new conduit."[13] In segTEL's view, building entry conduit that is owned or controlled by a utility is no different than any other conduit that must be made available on a non-discriminatory basis to telecommunications carriers and cable television systems.[14] Fibertech's proposed rule is reasonable and should be adopted by the Commission.

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[13] Fibertech Petition at 35.

[14] 47 USC § 224(f)(1).

Among the most critically important building entry facilities for a competitor is the conduit that provides access to the vault at an ILEC Central Office. The Commission has previously recognized the importance of conduit access and in the *TRRO*'s impairment analysis "assume[d] ... that existing conduit [would be] available to competitive carriers that seek to deploy their own transport facilities."[15] In several instances, ILECs have denied segTEL the right to bring its competitive fiber into a central office, claiming that building-entry conduit space is "not available". segTEL's inability to self-deploy fiber for its own purposes and to provide competitive transport service to carriers collocated in these central offices undermines the Commission's policy of promoting facilities based competition. Moreover, it would defy reason if segTEL and other CLECs collocated within one of those Central Offices were unable to access segTEL's competitive transport facilities while simultaneously being denied access to unbundled transport. The Commission's decision to eliminate access to unbundled network elements in certain circumstances was predicated on the availability of substitute competing fiber optic facilities at central offices, for which access to the ILEC's conduit is essential. The Commission's policy of promoting facilities based competition is not served if ILECs are allowed to use their control of the building's entry conduit as a bottleneck to obstruct competitors' access to competing fiber optic networks. If ILECs are serious about favoring facilities-based competition, and are not merely attempting to force CLECs to use their special access services, then conduit must be made available to competitors for entry to central offices. Competitive carriers such as segTEL have no other recourse than to look to the FCC for remedy to this problem, and the Commission should take action to prevent artificial barriers to conduit

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[15] *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 ¶ 77 (2005).

access, or should require that unbundled network elements continue to be available at such central offices until conduit space is made available. To accomplish a broad-based solution to the problem of access to central office conduit, the Commission should utilize a rulemaking proceeding such as the one proposed by Fibertech, which will provide all interested parties with notice and an opportunity to provide comments. Addressing the problem through the Commission's complaint and enforcement processes would be costly for competitors and less effective in promoting a comprehensive solution.

III. Conclusion

Most pole and conduit structures are still controlled by just one or two utility companies. Those structures are now critically important to competitive carriers, but are often unavailable due to the unequal bargaining power that pole and conduit owners enjoy. Most competitive providers have nowhere to look but to the FCC for assistance in resolving pole attachment problems and small facilities-based entrants can neither afford the cost nor the procedural response time of the Commission's enforcement processes. Fibertech effectively describes an environment in which access problems for competitors continue, and segTEL's experience has been similar in many respects. Accordingly, segTEL urges the Commission to initiate a rulemaking to adopt the "best practices" advocated by Fibertech. segTEL hopes that a clear set of rules by the Commission will have the effect of reducing conflicts with pole and conduit owners. However, as requested in these comments, the Commission should also consider an expedited process for resolving complaints of conduit and pole attachment matters and state

clearly that conduct involving discrimination, undue delay, or intentional overcharging may result in sanctions on a pole owner and damages being awarded to aggrieved attachers.

Respectfully submitted:

segTEL, Inc.

/s/ Jeremy L. Katz

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January 30, 2006